77-1104

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No. 77-1104

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

MONROE COUNTY CONSERVATION COUNCIL, INC., and RAY HUTHER, On His Own Behalf and on Behalf of All Others Similarly Situated,

Petitioners

-vs-

BROCK ADAMS, Individually and as Secretary of the United States Department of Transportation.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT.

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The petitioners, Monroe County Conservation Council, Inc., and Ray Huther, on his own behalf and on behalf of all others similarly situated, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in this proceeding on November 22, 1977.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Appendix A, pp.1-31) entered the 22nd day of November, 1977, has not yet been reported. The opinion of the United States District Court for the Western District of NewYork (Appendix B, pp. 1-4) entered the 1st day of August, 1977, has not been reported.

The opinion of the United States Court of Appeals for the Second Circuit (Appendix C, pp.1-39) entered the 18th day of December, 1972, is reported at 472 F. 2d 693. The opinion of the United States District Court for the Western District of New York (Appendix D, pp. 1-8) entered the 24th day of January, 1972, has not been reported.

JURISDICTION

1. The judgment of the United States Court of Appeals for the Second Circuit affirming the decision of the United States District Court for the Western District of New York, was entered the 22nd day of November, 1977, (Appendix A, pp. 1-31).

2. The jurisdiction of the Court is invoked under Title 28 of the United States Code, §1254(1), providing for the granting of a Writ of Certiorari upon the petition of any party after rendition of judgment by the Court of Appeals for the Second Circuit.

QUESTIONS PRESENTED

Genesee Valley Park, owned by the City of Rochester, New York, contains 842 acres of land and has been maintained as a public park since the late 1800's. More than thirty (30) years ago, State, County, and City officials set out to create a system of arterial expressways in and around the City of Rochester, including an "outer loop" which would encircle the City's perimeter. Today, the "outer loop" is complete, with the exception of a 4.25 mile gap. The questions presented here relate to the proposed action to complete the gap by construction of a highway through the Genesee Valley Park. Those questions are as follows:

1. Has the Court of Appeals for the Second Circuit erred in holding that the requirements of Department of Transportation

Order 5610.1B (23 C.F.R. §771.18(i)(2)(iii), specifically adopted to implement and comply with the National Environmental Policy Act, 42 U.S.C. §4321-4347, were satisfied by a conclusory statement in the Environmental Impact Statement which stated that no adverse social impact will result nor are any minority groups affected by the proposed action, without any foundation or the results of any social impact study documented therein to support it, especially since appellants presented documented results to the Court of a social study which clearly showed the contrary?

2. Has the Court of Appeals for the Second Circuit erred in holding that the requirements of Section 4(f) of the Department of Transportation Act (49 U.S.C. §1653(f) and Section 138 of the Federal-Aid Highway Act (23 U.S. §138) were met, in view of the decision of the Supreme

Court of the United States in Citizens to Preserve Overton Park, Inc., vs. Volpe, 401 U.S. 402 (1971), which sets forth the criteria to be used in determining whether a feasible and prudent alternative exists to taking parkland and in view of the Court of Appeals decision in Monroe County Conservation Council, Inc. v. Volpe, 472 F. 2d 693 (2nd Cir. 1972), which states "a road must not take parkland unless a prudent person, concerned with the quality of the human environment, is convinced that there is no way to avoid doing so."?

3. Has the Court of Appeals so far departed from the usual and accepted course of judicial proceedings in its opinion that the Environmental Impact Statement fully complied with all the requirements of the law so as to warrant exercise of the power of supervision of the Supreme Court of the United States?

4. Has the Court of Appeals so far sanctioned a departure by the District Court of the usual course of judicial proceedings, in that the District Court adopted the government's proposed findings of fact and conclusions of law in their entirety, without retyping, on the day following oral argument, during which he stated he had not yet read the columinous Environmental Impact Statement, as to call for the exercise of the power of supervision of the Supreme Court of the United States?

STATUTES AND REGULATIONS INVOLVED

The provisions of statutes and regulations which are relevant to the decision of this case, and the pertinent text of which is set forth in Appendix E hereto, are as follows:

1. Department of Transportation Order 5610.1B (September 30, 1974), 23 C.F.R. §771.18(i)(2)(iii).

2. National Environmental Policy Act of 1969, 42 U.S.C. §4321, et seq.

3. Department of Transportation Act of 1966, 49 U.S.C. §1653(f).

4. Federal-Aid Highway Act, 23 U.S.C. §138.

STATEMENT OF THE FACTS

This petition seeks to review the judgment of the United States Court of Appeals for the Second Circuit, which affirmed the judgment of the United States District Court for the Western District of New York, thereby vacating a prior order of the United States Court of Appeals for the Second Circuit that had enjoined federal funding for the construction of a highway through the Genesee Valley Park pending compliance with the National Environmental Policy Act, 42 U.S.C. §4321-4347, and §4(f) of the United States Department of Transportation Act of 1966, 49 U.S.C. §1653(f), and §138 of the Federal-Aid Highway Act, 23 U.S.C. §138.

The Rochester "Outer Loop" of New York, Route 47 (hereinafter referred to as the "Outer Loop") is part of a Federal-Aid

Highway Program system of arterial expressways created by State, County, and City officials more than thirty years ago. It is anticipated that the United States Government will reimburse the State of New York for approximately 60% of the cost. The "Outer Loop", as it presently exists, encircles the City's perimeter on the east, north, and west sides and the easterly portion of the south side. There is a 4.25 mile gap in the westerly portion of the south side between the Scottsville Road and Winton Road interchange. The Genesee Valley Park containing over 800 acres of land and being the only multiple-use park in the City of Rochester, lies in between these interchanges. In order to connect these interchanges, the New York State Department of Public Works sought the approval of the United States Bureau of Public

Roads (now the Federal Highway Administration) in 1967 for construction of a four-lane divided highway directly through the Genesee Valley Park.

On May 7, 1971, the Secretary of the United States Department of Transportation, John A. Volpe, approved a four-page memorandum submitted by the State for the purposes of complying with §4(f) of the United States Department of Transportation Act, 49 U.S.C. §164(f).

On July 20, 1971, the Monroe County Conservation Council, Inc., and Ray Huther (hereinafter referred to collectively as the Conservation Council) commenced this action in the United States District Court for the Western District of New York. They sought both a declaratory judgment that the actions and proposed actions of the Secretary of the United States Department of Transportation were illegal and a pre-

liminary and permanent injunction injoining the Secretary from taking any further action or disbursing any federal funds with regard to the Outer Loop. Both parties made motions for summary judgment and all motions were heard by the Honorable Harold P. Burke in the District Court on September 27, 1971. Judge Burke issued his Findings of Fact and Conclusions of Law on December 30, 1971 and dismissed the action and the Conservation Council's motions, finding the Secretary had met all the requirements of the law. In accordance therewith, the judgment was entered January 24, 1972 (annexed hereto as "Appendix D").

The Conservation Council appealed from this judgment to the United States Court of Appeals for the Second Circuit. On December 18, 1972, the Court of Appeals reversed the judgment of the District Court

and remanded the case for further proceedings. The Court of Appeals further enjoined the Secretary from approving the funding of the unfinished segment of the Outer Loop project until an Environmental Impact Statement was prepared in accordance with the requirements of the National Environmental Policy Act, 42 U.S.C. §4321-4347; the regulations of the Department of Transportation implementing the National Environmental Policy Act (as amended and applicable at present, 23 C.F.R. 771.18(i)(2)(iii); §4(f) of the United States Department of Transportation Act 49 U.S.C. §1653(f); and §138 of the Federal-Aid Highway Act, 23 U.S.C. §138. (See Appendix C.)

On January 21 and 23, 1975, a public hearing, as required by the National Environmental Policy Act, 42 U.S.C. §4321 et seq., was held whereupon testimony

could be presented by all interested persons. Conservation Council witnesses gave testimony regarding the social impact study that they made, including a presentation of their exhibits, photographs, and slides which clearly showed that the majority of the park users are blacks and that the highway would clearly have a significant adverse social impact upon them. The government presented no testimony to the contrary whatsoever. The exhibits, photographs, and slides aforementioned constitute part of the record before both the District Court and the Court of Appeals.

The Environmental Impact Statement was prepared and approved by the New York State Department of Transportation on November 18, 1975. The Federal Highway Administration gave its approval to the Environmental Impact Statement on May 18, 1977.

The Defendant-Appellee made a motion to the United States District Court for the Western District of New York to vacate the earlier injunction and order of the United States Court of Appeals for the Second Circuit, by way of an Order to Show Cause dated July 25, 1977. Oral argument on the motion was heard before the Honorable Harold P. Burke on July 28, 1977. The following morning, Judge Burke adopted the defendant-appellee's proposed findings of fact and conclusions of law in their entirety, without even retyping them, and had indicated at oral argument that he had not yet read the voluminous record. In accordance therewith, a judgment was entered August 1, 1977, granting the defendant-appellee's motion, and is hereto annexed as "Appendix B."

The Conservation Council again appealed from the judgment to the United States

Court of Appeals for the Second Circuit, contending that (1) the requirements of the National Environmental Policy Act, 42 U.S.C. §4332(2)(c)(iii), and the Department of Transportation Order, 23 C.F.R. §771.18(i)(2)(iii), designed to implement it, had not been met in that no study was made by the government regarding the social and economic impacts of the proposed action; and the government, in its brief, admitted that no such study was made, and (2) that the Secretary of the United States Department of Transportation did not act within the scope of his authority and did not comply with §4(f) of the United States Department of Transportation Act, 49 U.S.C. §1653(f), and §138 of the Federal-Aid Highway Act, 23 U.S.C. §138, in his finding that none of the alternatives to the use of the Genesee Valley Park for highway purposes were feasible or prudent. Counsel

for both parties were heard at oral argument on October 20, 1977. On November 22, 1977, the Court rendered its decision, affirming the judgment of the District Court. The Court considered the alternatives to the proposed action that were considered in the Environmental Impact Statement and summarily dismissed the Conservation Council's contention that the Department of Transportation's purported compliance with the statute was a sham from the outset in that alternate routes and designs were selected with no one could otherwise argue, were not feasible and prudent. Additionally, the Court dismissed the Conservation Council's contention that the alternative of constructing the highway immediately to the south of the park was not even considered. Furthermore, the Court stated that "A substantial portion of the Environmental Impact Statement has been devoted

to the probably significant social impact of the proposed construction....and the conclusion reached was that it will have none." The government admitted and stated in its brief that the Environmental Impact Statement did not discuss adverse social effects of the proposed action. Then it concluded, without setting forth any foundation, basis or reasons behind its conclusion, that "(n)o major change is foreseen in neighborhood character, cohesiveness and stability, nor are there any known minority groups affected by the project. Yet no study was in fact made as to the effect on the people who use the park or who those people are. The Conservation Council did make a detailed study, including photographs of the use of the park, which was part of the record before the Court, on the social and economic impact of the project and found that in fact a

large majority of the park users were black persons and that the proposed action would have an adverse effect on them. In sum, the Court of Appeals prefaced nearly all their findings with "according to the Environmental Impact Statement."

The Conservation Council contends that the Environmental Impact Statement must comply with all the statutes and federal regulations promulgated to implement them. Clearly, the Environmental Impact Statement was not meant to give the government a free hand to do whatever it wants without accountability to anyone. While the Conservation Council acknowledges that by law it had the burden of prcof to establish that the Environmental Impact Statement was defective and inadequate or that the Secretary of the Department of Transportation acted improperly in approving the use of parklands, it strongly believes that it

clearly met and overcame this burden.

Therefore, the Conservation Council respectfully makes this petition for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I

THIS CASE MERITS REVIEW BY THIS COURT ON CERTIORARI BECAUSE THIS COURT NEEDS TO SETTLE THE QUESTION WHETHER OR NOT MERE CONCLUSORY STATEMENTS MADE BY THE DEPARTMENT OF TRANSPORTATION IN AN ENVIRONMENTAL IMPACT STATEMENT, WITHOUT ANY FOUNDATION OR BASIS THEREFORE SET FORTH THEREIN, SATISFIES THE REQUIREMENTS OF A DEPARTMENT OF TRANSPORTATION ORDER, 23 C.F.R. §771.18(i)(2)(iii), WHICH REQUIRES A DISCUSSION AND CONSIDERATION OF SIGNIFICANT SOCIAL IMPACTS ANTICIPATED BY THE PROPOSED ACTION IN THE ENVIRONMENTAL IMPACT STATEMENT.

The Conservation Council requests this Court to grant a Writ of Certiorari in the case before bar because it is of extreme importance that this Court settle the question of the correct interpretation to be given to this important federal regulation. Never before has this Court so determined this question, and to date, the only court

to pass thereon is the Court of Appeals for the Second Circuit.

The pertinent federal regulation involved is an order of the United States Department of Transportation, 23 C.F.R. §771.18 regarding the necessary factors to be considered, discussed, and identified in an Environmental Impact Statement (hereinafter referred to as E.I.S.) when one is in fact required. The specific section thereof which requires settlement by this Court is 23 C.F.R. §771.18(i)(2)(iii), which mandates "a discussion of the significant social impacts anticipated to be caused by the proposed actior." A further requirement therein is to give special consideration "with respect to jobs, schools, churches, parks, hospitals, shopping and community services" to the effects of the proposed action on special groups of persons, including the "elderly, mass transit depen-

dents, the handicapped, the illiterate, low income persons, and racial, ethnic or religious groups."

In the present case, the proposed action consists of constructing a major highway through the Genesee Valley Park. The Court of Appeals concluded that such proposed action does in fact require an Environmental Impact Statement to be prepared. (See Appendix C, pp. 31). Yet no discussion of the social impact which the highway would have was included in the Environmental Impact Statement. In fact, the government argues that no discussion thereof is required and went on to conclude in its Environmental Impact Statement without any foundation or basis therefore set forth therein, that "[n]o major change is foreseen in neighborhood character, cohesiveness and stability, nor are there

any known minority groups affected by the project." The Conservation Council submits that a discussion in the Environmental Impact Statement cannot be dispensed with by such an unfounded conclusory statement, as the government argues. Indeed, if the government's interpretation is correct, then it could easily and readily conclude anything it wanted in the Environmental Impact Statement without ever having to account to anyone. Clearly, the Environmental Impact Statement is not meant to give the government a free hand in doing whatever it wanted, without affording any means by which the validity of the statements therein could be challenged. Rather, it is meant to be a comprehensive and thorough examination of a proposed project to insure promotion of national policy which is to encourage productive and enjoyable harmony between man and his en-

vironment and prevent or eliminate damage to the environment. National Environmental Policy Act, 42 U.S.C. §4321, et seq. Therefore, the Conservation Council submits that the requirements of 23 C.F.R. §771.18(i)(2)(iii) must be met in the Environmental Impact Statement, thereby including a discussion and consideration of the social impact of the proposed highway through Genesee Valley Park. It is further submitted that to include a credible and accurate discussion of the social impacts, it is absolutely essential that a study be made by the government in which it determines how many people use the park and their financial status, ages, accessibility to a motor vehicle or mass transit, physical or mental handicaps, and racial or ethnic composition. Without knowing these factors, compliance with 23 C.F.R. §771.18(i)(2)(iii) is unquestionably im-

possible.

In the case before bar, the Conservation Council in fact conducted and prepared a study of the social impacts the proposed project would have including photographs which are all a part of the record. The results of the study and the explanation of the procedure used to arrive at them were presented at the public hearing on January 21, 1975 (made part of the record hereof). They clearly showed that the majority of the park users are black persons and the highway would have a significant adverse effect on them. Record, Transcript of Public Hearing, pp. 57-132. Therefore, the only credible and accurate facts and figures concerning the social impacts that were before both the Department of Transportation and the courts clearly demonstrated that the proposed highway would have significant adverse

social effects.

II

THIS CASE MERITS REVIEW BY THIS COURT ON CERTIORARI BECAUSE THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE HOLDING OF THE SUPREME COURT IN CITIZENS TO PRESERVE OVERTON PARK, INC., v. VOLPE, 401, 402 (1971).

The United States Department of Transportation Act, Section 4(f), 49 U.S.C. §1653(f), and the Federal-Aid Highway Act, Section 138, 23 U.S.C. §138, prohibit the Secretary of the Department of Transportation from approving a project which requires the taking of parkland unless (1) there is no feasible and prudent alternative thereto and (2) all possible planning to minimize harm to the park has been made. The United States Supreme Court, in its landmark decision of Citizens To Preserve Overton Park, Inc., v. Volpe, 401 U.S. 402 (1971) clearly set forth the criteria

to be used by the Secretary in making his determination and the scope of review thereof by the reviewing court.

The Supreme Court stated that to so find an alternative not feasible, "the Secretary must find that as a matter of sound engineering it would not be feasible to build the highway along any other route." supra at 411. To determine whether an alternative is prudent, the Court made the following statement, which is quoted because of its significant bearings on the case at bar:

> "It is obvious that in most cases considerations of cost, directness of route, and community disruption will indicate that parkland should be used for highway construction whenever possible. Although it may be necessary to transfer funds

from one jurisdiction to another, there will always be a smaller outlay required from the public purse when parkland is used since the public already owns the land and there will be no need to pay for right-of-way. And since people do not live or work in parks, if a highway is built on parkland no one will have to leave his home or give up his business. Such factors are common to substantially all highway construction. Thus if Congress intended these factors to be on an equal footing with preservation of parkland there would have been no need for the statutes."

"Congress clearly did

not intend that cost and disruption of the community were to be ignored by the Secretary. But the very existence of the statute indicates that protection of parkland was to be given paramount importance. The few green havens that are public parks were not to be lost unless there were truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes reached extraordinary magnitudes. If the statues are to have any meaning, the Secretary cannot approve the destruction of parkland unless he finds that alternative routes present unique problems." Id. at 412.

The Court then stated that the scope of review of the reviewing court is to consider whether the Secretary construed his authority properly. The court must be able to find that the "Secretary could have reasonably believed that in this case there are no feasible alternatives or that alternatives do involve unique problems." Id. at 416. Furthermore, the court must be able to find that the Secretary's choice was "not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Id. at 417. The Court further states as follows:

> That review is to be based on the full administrative record that was before the Secretary at the time he made his decision. But since the bare record may not disclose

the factors that were considered or the Secretary's construction of the evidence it may be necessary for the District Court to require some explanation in order to determine if the Secretary acted within the scope of his authority and if the Secretary's action was justifiable under the applicable standard. Id. at 417.

In the case at bar, the Secretary considered only five alternatives which would not involve the taking of parkland. One was a "do-nothing" alternative. A second was only extending the Outer Loop a short distance. A third alternative consisted of completing the Outer Loop to the north of the park directly through the

City, the University of Rochester, and Mt. Hope Cemetary. The fourth and fifth alternatives envisioned completion of the Outer Loop by proceeding many miles south of the park. It is indeed ironic that at no time did the Secretary consider completing the Outer Loop by proceeding directly along the southern border of the park, the most obvious alternative. Additionally, the very factors which the Supreme Court stated should not be of the utmost importance, see Id. at 412, were those which the Secretary considered.

In the case before bar, the District Court adopted the proposed findings of facts and conclusions of law of the government, in toto, the morning following the oral argument, which is the time at which the voluminous Environmental Impact Statement was presented to him. Clearly, no review of the Secretary's initial determination

could possibly have been made by the District Court.

The Court of Appeals reviewed only the alternatives to the proposed action which were presented in the Environmental Impact Statement. It nowhere asked the government for some explanation of why the most obvious alternative, that of proceeding directly to the south of the park, was never considered, in determining whether the Secretary's action was justifiable. Furthermore, every conclusory statement made in the Environmental Impact Statement concerning the nonfeasibility of the alternatives was accepted as the "gospel truth" by the Court of Appeals, even after the Conservation Council presented evidence substantiated by documentation which clearly showed the contrary was in fact true. A cursory reading of the Court of Appeals' opinion clearly indicates this

in that in twelve times it prefaces its findings by "according to the Environmental Impact Statement" or words of similar import. Certainly a review contemplated by the Supreme Court in Citizens To Preserve Overton Park v. Volpe was never made.

III

THIS CASE MERITS REVIEW BY THIS COURT ON CERTIORARI BECAUSE THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH ITS DECISIONS IN MONROE COUNTY CONSERVATION COUNCIL, INC., et al. v. VOLPE, 472 F. 2d 693 (1972) and COUNTY OF SUFFOLK v. SECRETARY OF THE INTERIOR, Nos. 77-6049, 6050, slip op 5521 (August 25, 1977).

In its 1972 decision in the case at bar, the Court of Appeals set forth the requirements of the statutes and federal regulations involved. The Court reiterated the requirements set forth by the Supreme Court of the United States in Citizens to Preserve Overton Park, Inc., v. Volpe, supra, regarding the determination and

review of the feasibility of the alternatives. Clearly, in its most recent opinion in the case at bar, the Court of Appeals retracted from these requirements although the Overton Park case still represents the official opinion of the United States Supreme Court regarding the taking of parkland for highway purposes.

In its 1972 decision in the present case, the Court of Appeals further stated that the requirements of the applicable Department of Transportation Order (as amended and applicable to date, 23 C.F.R. §771.18(i)(2)(iii) must be met. As stated in Point I herein, the government argues that no such compliance on its part is necessary and in fact, admits it has not so complied. Yet the recent decision of the Court of Appeals, while side-stepping this issue, represents a complete turnabout in its position concerning compliance by

a federal agency of its own mandatory regulation.

An apparent conflict additionally exists in regard to the scope of review which must be exercised by a reviewing court. In its August, 1977, opinion in County of Suffolk v. Secretary of the Interior, Nos. 77-6049, 6050, slip op 5521, 5548, the Court of Appeals stated the district court is to determine "whether the Environmental Impact Statement was compiled in objective good faith and whether the resulting statement would permit a decisionmaker to fully consider and balance the environmental factors." Clearly, as noted in Point II herein, the District Court could not have possibly made any review at all of the Environmental Impact Statement in the few hours it took to render its decision.

Additionally, the Court of Appeals,

in the case at bar, could not have met the standard of review that it set forth in the County of Suffolk case. In the County of Suffolk case, supra at 5331, the Court stated that while an "Environmental Impact Statement need not be exhaustive to the point of discussing all possible details bearing on the proposed action," it must be "compiled in good faith" and must set forth "sufficient information to enable the decision-maker to consider fully the environmental factors involved." Without compliance with the Department of Transportation Order, 23 C.F.R. §771.18(i)(2)(iii), the environmental factors involved could not possibly be considered fully.

IV

THIS CASE MERITS REVIEW BY THIS COURT ON CERTIORARI BECAUSE THE COURT OF APPEALS SO FAR DEPARTED FROM THE ACCEPTED AND VISUAL COURSE OF JUDICIAL PROCEEDINGS AND SANCTIONED SUCH A DEPARTURE BY THE DISTRICT

COURT AS TO CALL FOR THE EXERCISE OF THE POWER OF SUPERVISION OF THIS COURT.

The Conservation Council respectfully requests the Court in the case before bar to grant a writ of certiorari because of the flagrant abuse of judicial process practiced by both the District Court and the Court of Appeals from the commencement of this action in 1971. At no point thus far has a fair appraisal of the merits of this case been made.

The initial decision of the District Court went so far as to sanction the project without requiring an Environmental Impact Statement to be prepared, in flagrant disregard of the requirements of the National Environmental Policy Act. The District Court made additional findings which were in direct conflict with existing laws. It went so far as to summarily rule that the Genesee River was not navigable in

total and direct contravention of statutes, court rulings and conceded size and depth of the river. See Rochester Gas and Electric Corporation v. Federal Power Commission, 334 F. 2d 595 (2d Cir. 1965); Federal Rules of Civil Procedure, Rule 56.

Upon reversal and remand of the case before bar by the Court of Appeals in 1972, the District Court again made a mockery of our judicial system. On July 28, 1977, upon the government's motion to vacate the existing injunction, the Honorable Harold P. Burke, District Court Judge, heard oral arguments by both counsel. At that time, the three large volumes of the Environmental Impact Statement and the voluminous transcript of the January 21 and 23, 1975 Public Hearing, were delivered to him. The following morning, he accepted the government's Proposed Findings of Facts and Conclusions of Law, without exercising the

formality of retyping the same. The Conservation Council submits that under no circumstances could any person possibly read the entire record in less than one day much less comprehend and analyze the situation. Such flagrant disregard and disrespect for our judicial system by a judge thereof shocks the conscience of all involved and calls out for this Court to exercise its power of supervision.

Additionally, the Court of Appeals sanctioned the cursory treatment given this action by the District Court. Such a sanction of this departure from the usual course of judicial proceedings calls for the exercise of supervision of this Court.

The Court of Appeals, in footnote 7 of its opinion, stated that although the District Court cursorily reviewed the case before bar, it was in "as good a position

as the district court to determine on the undisputed facts what could reasonably be demanded of the Environmental Impact Statement in issue." Yet it did not in fact make such a thorough, in-depth review of the record. Rather, it merely accepted the conclusions made in the Environmental Impact Statement without questioning the basis or foundation therefore. Yet, it is obvious to any person who has visited the Genesee Valley Park that many of those conclusions were totally false.

The Environmental Impact Statement concluded that no known minority groups would be affected by the project. Yet a very large segment of the people who use the park are Black. This fact was clearly stated in the findings of the social impact study performed by the Conservation Council. These findings, including

exhibits and photographs, were presented by the Conservation Council at the Public Hearing held January 21 and 23, 1975, and made a part of the record hereof. Yet the Court of Appeals apparently ignored and failed to consider this in arriving at its decision.

The District Court additionally departed from the accepted judicial process in that it failed upon request to send to the District Court in Buffalo, for certification as part of the record herein, all of the Conservation Council's exhibits and photographs, formerly referred to in the preceding paragraph. It was not until approximately one week before oral argument in the Court of Appeals that the Conservation Council discovered the said failure whereupon it contacted the District Court and was informed the said exhibits and photographs were lost.

However, the Conservation Council diligently sought out the location thereof, only to discover the said exhibits and photographs were in fact in the District Court. The Conservation Council submits to this Court that this temporary misplacement of the Conservation Councils' exhibits and photographs may have in fact been intentional, as the government's exhibits, which were in the District Court's possession and kept with the Conservation Council's, did originally become a part of the record.

The Conservation Council respectfully requests that this Court exercise its power of supervision and grant the Writ requested herein so that a fair and accurate appraisal of the merits of the case before bar may finally be had.

CONCLUSION

For the reasons above stated, the petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

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UNITED STATES COURT OF APPEALS
For the Second Circuit

No. 289 September Term, 1978

(Argued October 20, 1977
Decided November 22, 1977)

Docket No. 77-6129

MONROE COUNTY CONSERVATION COUNCIL, INC., and RAY HUTHER, on his own behalf and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

BROCK ADAMS, Individually and as Secretary of the United States Department of Transportation,

Defendant-Appellee.

Before: LUMBARD, FEINBERG AND VAN GRAAFEILAND, Circuit Judges.

Appeal from an order of the United States District Court for the Western District of New York, Harold J. Burke, Judge, vacating a prior order which had enjoined federal funding for the construction of a highway segment pending

compliance with NEPA, 42 U.S.C. § 4321-4347, and § 4(f) of the United States Department of Transportation Act of 1966, 49 U.S.C. § 1653(f), on findings by the district court that the requirements of these statutes had now been met.

Affirmed.

WAYNE M. HARRIS, Rochester, N. Y. (Harris, Maloney, Horwitz & Evans, Rochester, N. Y.), for Plaintiffs-Appellants.

EVA R. DATZ, U. S. Department of Justice, Washington, D.C. (James W. Moorman, Asst. Attorney General, Washington, D.C.; Richard J. Arcara, U.S. Attorney, Gerald J. Houlihan, Asst. U.S. Attorney, Rochester, N.Y.; Jacques B. Gelin, U.S. Department of Justice, Washington, D.C.), for Defendant-Appellee.

VAN GRAAFEILAND, Circuit Judge:

Because its street had not been designed to handle the mass movement of motorized vehicles, Rochester, N.Y., like many other older cities, was ill-prepared for the advent of the automobile. More than thirty years ago, State, County and City officials set out to create a system of arterial expressways to solve, in part at least, the serious traffic problem existing in the City and its adjoining towns. Their efforts culminated in a plan for an "inner" expressway loop around the downtown Rochester area and an "outer" loop around the City's perimeter. Construction of the inner loop has been completed. We are concerned on this appeal with the State's efforts to complete the outer loop.[1]

This loop, as it presently exists, encircles the City on the east, north

and west sides and the easterly portion of the south side.[2] There is, however, a four-mile gap in the westerly portion of the south side. Athwart this gap sits an 842 acre public park known as Genesee Valley Park. In 1967, the New York State Department of Public Works sought the approval of the United States Bureau of Public Roads (now the Federal Highway Administration) for construction of a roadway viaduct over a portion of this park. Approval was granted in 1968. In 1970, the State submitted additional documentation for purposes of compliance with § 4(f) of the United States Department of Transportation Act of 1966 as amended. 49 U.S.C. § 1653(f).[3] This submission was approved by the Secretary of Transportation on May 7, 1971.

However, the enactment of NEPA, the National Environmental Policy Act of 1969,

42 U.S.C §§ 4321-4347, and the subsequent prosecution of this suit by the Monroe County Conservation Council, Inc. resulted in a judicial roadblock to the completion of the highway. In 1972, on a prior appeal by the Conservation Council, this Court held that, although the project had been almost completed, the State had to comply with the provisions of NEPA for the unfinished portion, including the preparation of an Environmental Impact Statement (EIS) as required by 42 U.S.C. § 4332. See Monroe County Conservation Council, Inc. v. Volpe, 472 F. 2d 693 (2d Cir. 1972). We held also that, up to that point, there had been inadequate compliance with § 4(f). The Secretary of Transportation was enjoined from approving funding of the unfinished segment until the statutory requirements had been met.

Five years have now passed. Public hearings have been held, and comments have been solicited from appropriate public and private agencies. A 395 page EIS, with a 331 page Appendix, and a revised 81 page 4(f) Statement have been prepared and filed. The approval of the Secretary of Transportation has been obtained once more. A motion to vacate the prior injunctive order was granted in the United States District Court for the Western District of New York on findings that the requirements of that order had been met, and plaintiffs bring the matter before this Court once again.[4]

Plaintiffs advance two principal contentions on this appeal: (1) that inadequate consideration was given to alternatives to the proposed construction, 42 U.S.C. § 4332(2)(C)(iii) and 49 U.S.C § 1653(f); and (2) that

inadequate consideration was given to its social impact, 42 U.S.C. § 4332(2)(C)(i) and 23 C.F.R. § 771.18(i)(2)(iii). We have made a careful review of the record and summarize below the facts which are pertinent to these contentions. Before doing so, however, we define briefly the role which a district court plays in cases of this nature.

With regard to the EIS, the task of the district court "is merely 'to determine whether the EIS was compiled in objective good faith and whether the resulting statement would permit a decisionmaker to fully consider and balance the environmental factors.'" County of Suffolk v. Secretary of the Interior, Nos. 77-6050, slip op. 5521, 5548 (2d Cir. Aug. 25, 1977) (quoting Sierra Club v. Morton, 510 F.2d 813, 819 (5th Cir. 1975).

> In making such a determination a court is governed by the "rule of reason", under which an EIS need not be exhaustive to the point of discussing all possible details bearing on the proposed action but will be upheld as adequate if it has been compiled in good faith and sets forth sufficient information to enable the decision-maker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice between alternatives. (Citations omitted).

County of Suffolk v. Secretary of the Interior, supra at 5531.

Insofar as the 4(f) Statement is concerned, the district court must ascertain first whether the Secretary of Transportation acted within the scope of his authority, i.e., whether the Secretary could have reasonably believed that there were no feasible alternatives to the use of parklands or that the alternatives involved unique problems.

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). The court, without substituting its own judgment for that of the agency, must then determine that the choice made was not arbitrary, capricious, an abuse of discretion or a violation of law. Id. Finally, the court must satisfy itself that the correct procedures have been followed in arriving at the decision under review. Id. at 417.

The burden of proof is on the challenging plaintiff to establish that the EIS was inadequate or that the Secretary of Transportation had acted improperly in approving the use of parklands. Sierra Club v. Morton, supra, 510 F. 2d at 818; Sierra Club v. Callaway, 499 F. 2d 982, 992 (5th Cir. 1974).

The Alternatives

Genesee Valley Park is an 842-acre peninsula projecting from the southwest

perimeter of Rochester into the neighboring towns. It lies in the flood basin of the Genesee River and extends southwesterly along the river for approximately three miles. Immediately north and northwest of the park is the Monroe County Airport, which is in the town of Gates. Between the airport and the park is Scottsville Road, which runs parallel to the river. To the south and east are the towns of Brighton and Henrietta. Residential Rochester is primarily to the northeast, and the park is bordered on the northeast side by Elmwood Avenue, which begins at the end of Scottsville Road at the northwest corner of the park and runs generally east.

The Barge Canal runs generally east and west through the town of Brighton, cuts through the park near its northeast end, and then swings to the north along

the City's western boundary. The western portion of the outer loop, constructed between 1963 and 1965, runs parallel to the canal between the airport and the City and ends at Scottsville Road near the canal bridge. The proposed highway will follow the path of the canal from Scottsville Road through the park on an elevated viaduct. Thereafter it will continue by surfact route for about a mile to the east. After that it will swing slightly north across the canal and connect with the western end of the existing southerly segment of the loop. The viaduct through the park, of spanned concrete construction, will be approximately 2100 feet in length, including a 430-foot river span, and will be on the south side of the canal.

As set forth in detail in the EIS and the 4(f) Statement, the Department of

Transportation considered thirteen alternatives to the recommended construction, five of which did not make use of parklands and eight of which did. The first, of course, was the "do-nothing" alternative. This alternative, taking into account the possible benefits of projected mass transportation improvements, was felt not to be a viable one. The population of the town of Brighton in 1975 was 38,500. It is estimated that this will increase to 49,500 by 1995. Henrietta's 1975 population was 47,000, and this is expected to increase to 101,000. If the loop were not completed, traffic congestion in these towns would increase -- on some roads as much as 150%. Extensive reconstruction of local roadways would be required, with minimum beneficial results. In the words of the EIS, "the alternative of doing nothing does nothing to solve existing,

let alone future, traffic problems in Brighton and Henrietta."

Closely akin to the do-nothing alternative, and unsatisfactory for many of the same reasons, was the possibility of continuing the southern segment of the loop only a short distance to the west, stopping at a point where a proposed southern expressway (the Genesee Expressway) is intended to intersect the outer loop. From that point, a connection would be made with several existing streets running to downtown Rochester. It was concluded that this also would do little to relieve the traffic congestion which completion of the outer loop was intended to eliminate. According to the EIS, this alternative "is comparable to the 'Do Nothing' alternative with respect to providing traffic relief on major arterials west of the proposed Genesee Expressway."

A third alternative envisioned completing the loop with a highway which avoided the park by circling to the north through the City. This would require cutting through extensive residential areas on both sides of the Genesee River, as well as the campus of the University of Rochester and the Mt. Hope Cemetery. The EIS concludes that "[t]he displacement and disruption potentially rendered by such an alternative would be so great as to be unthinkable and totally unacceptable." It points out that every governmental and civic group which has studied location alternatives has reached the same conclusion.

In the fourth and fifth alternatives, the expressway would detour to the southwest around the park and would then proceed north along the west side of the airport. Under one proposal, the

expressway would connect directly with the outer loop about one mile north of the airport. Under the other, it would connect with Chili Avenue, an existing east-west highway which runs north of the airport and intersects the outer loop. Each would bypass that portion of the completed loop running along the east side of the airport. The first proposed route would cost 43 million dollars more than the recommended route through the park and would be 5.75 miles longer. The second would cost 28 million more and would be 4.7 miles longer. Having in mind the purpose of the outer loop to move traffic expeditiously around the City and to provide traffic relief for the towns of Brighton and Henrietta, the Department of Transportation concluded that the fourth and fifth alternatives, swinging so far out of the intended line of travel, were

feasible but not prudent.[5]

All of the remaining alternatives required some use of the park. Alternatives number six contemplated the reconstruction of Scottsville Road, Elmwood Avenue and two other existing streets into a 100-foot wide expressway which would encircle the park at its northern end. At least forty homes would have to be removed to accomplish this. The highway, which is expected to carry more than forty thousand vehicles a day, would go directly past Strong Memorial Hospital which is on Elmwood Avenue, just east of the park. Although only a small portion of the park would have to be taken to accomplish this reconstruction, the actual "use" of the park within the meaning of § 4(f) would be much greater. The park, like the hospital and nearby homes, would be subject to the unpleasantness which accompanies the heavy

flow of surface traffic. In addition, access to the park from the adjoining residential areas would become difficult and hazardous because of the necessity of crossing a heavily-travelled, six-lane arterial highway. These factors add up to a "use" of the park under the statute. See Brooks v. Volpe, 460 F.2d 1193,1194 (9th Cir. 1972); Conservation Society v. Secretary of Transportation, 362 F. Supp. 627, 638-39 (D.Vt. 1973), aff'd, 508 F. 2d 927 (2d Cir. 1974). The DOT concluded that a highway in this location would be incompatible with adjacent land uses, "residential, park and quasi-public institution," and described it as a possible but poor alternative.

The seventh alternative contemplated a viaduct through the park directly along the banks of the canal, with the westbound and east-bound roadways located

north and south of the canal respectively. The impact of this construction would be similar to that of the recommended route. However, it would affect both banks of the canal, whereas the proposed construction is confined to the south side. It would thus prevent completion of the park segment of a hiking and bicycling trailway along the north bank of the canal which is included in the proposed plan.

The eighth possibility called for the loop to intersect the park in a north-south direction. The expressway would run partly at grade and partly by viaduct. It would require the redesign of two golf courses, would utilize the greatest amount of park land and would cause the greatest long term change to existing facilities. It was therefore deemed a less desirable choice.

The ninth and tenth alternatives

considered the construction of a tunnel along the recommended east-west route through the park, one of cut-and-cover construction and the other of driven construction. The eleventh and twelfth alternatives contemplated both types of tunnel construction along the north-south route through the park. The cut-and-cover tunnel along the east-west route would be approximately 4,300 feet long and would cost 76 million dollars, or 56 million dollars more than the recommended viaduct.[6] The driven tunnel along this route would be approximately 5,500 feet long and would also cost 76 million dollars. The cut-and-cover tunnel along the north-south route would be approximately 3,560 feet long and would cost 63 million dollars, or 39 million dollars more than similarly aligned surface construction. The driven north-south tunnel would be

approximately 4,900 feet long and would cost 67 million dollars, or 43 million dollars more than the surface construction. The annual maintenance cost for a tunnel, nearly one-half million dollars, would be substantially higher than for the recommended viaduct. Although other disadvantages associated with the construction and use of tunnels are discussed at length in the EIS and 4(f) Statement, they were considered to be feasible alternatives to the recommended viaduct construction. However, for obvious reasons, they were not deemed to be prudent ones.

A thirteenth alternative, which was suggested by the Environmental Protection Agency, was "chunneling"--submerging prefabricated tunnel sections into the canal so that the tunnel could run along the canal bottom. It is determined that it would be physically impossible to

place a chunnel section, 100 feet wide and 20 feet high, in a canal which was only 75 feet wide and 12 feet deep.

We are satisfied that the foregoing constitute a reasonably comprehensive selection of alternatives, made in good faith. We find no merit, therefore, in appellants' contention that the Department of Transportation "selected alternative routes and designs which, no one could argue otherwise, were infeasible and not prudent." Undoubtedly, innumerable additional variations of routes and designs could have been considered and analyzed. However, the Department of Transportation was not "obligated 'to consider in detail each and every conceivable variation of the alternatives stated;' it 'need only set forth those alternatives "sufficient[ly] to permit a reasoned choice".'" Coalition for Responsible Regional Development v.

Coleman, 555 F. 2d 398, 400 (4th Cir. 1977) (quoting Brooks v. Coleman, 518 F. 2d 17, 19 (9th Cir. 1975); see also Life of the Land v. Brinegar, 485 F. 2d 460, 472 (9th Cir. 1973), cert. denied, 416 U.S. 961 (1974). We conclude that the district court did not err in finding that the EIS provided adequate consideration of alternatives and that the alternatives to use of park land were analyzed in the 4(f) Statement and shown to be either not feasible or not prudent.[7]

The Social Impact

A substantial portion of the EIS has been devoted to the probable significant social impact of the proposed construction, see 23 C.F.R. § 771.18 (i)(2)(iii); and the conclusion reached was that it will have none.

For those dependent upon public transportation, the EIS points out that the project is not intended to supplant

existing or proposed transit systems but to complement them. Bus turnouts and park-and-ride facilities are included in the loop design, and utilization of the loop for express bus service has been recommended in the Rochester Metropolitan Transportation Study. Non-drivers, who use public transportation, will not be adversely affected by the construction.

According to the EIS, the project causes no displacement of residential, commercial or industrial land uses. Most of the land east of the park is already publicly owned and has been reserved for use in the contemplated construction. The remainder is farmland. There is expected to be little recognizable impact on home building, property values or governmental services. No neighborhood blight will follow the construction, nor will any subdivisions be isolated through changes in local access. Completion of

the loop is expected to have little effect on governmental institutions, the provision of public services, the resource base of the towns, and amenities of life in general. In sum, according to the EIS, "[n]o major change is foreseen in neighborhood character, cohesiveness and stability, nor are there any known minority groups affected by the project."

The impact of the project on the park is described as minimal. In 1957, when the city made its original decision to run the outer loop through the park, it acquired an additional 27 acres of land as replacement for the land which the loop would occupy. Under the recommended proposal, only 10.7 acres will be required for the viaduct, and 5.3 acres of usable land beneath the viaduct will be returned to park usage. None of the land involved is active recreation area, i.e., golf course, play field or picnic

grounds. There are no man-made improvements in the area, which is described as generally wooded with little underbrush. It is now used primarily for do-it-yourself automobile repairs, car washing, strolling, fishing and just sitting. The project contemplates the creation of an under-bridge parking area with an associated access road, together with automobile boat-launching ramps for the canal. Vehicular and pedestrian traffic to and through the park will not be adversely affected, nor will the use of the canal for recreation. Indeed, a recreational trailway along the canal is projected as part of the project. Major steps will be taken to prevent contamination of air and water, to eliminate noise, to maintain the general quality of the environment and to minimize harm to the park. The project as recommended has been approved by the Monroe County

Department of Parks. In short, says the EIS, the park will remain available for those who use it now; access to it will remain the same, and residents of the city will suffer no adverse social effects as a result of the proposed construction.

The district court's finding that "[t]he Federal Highway Administration, in conjuction with the New York State Department of Transportation in good faith has taken a hard look at all the environmental consequences associated with the proposal..." is fully supported by the record and is not erroneous.

As stated above, a court, in reviewing an EIS and a 4(f) Statement, is not empowered to make a de novo determination concerning the advisability of the proposed construction. Neither is it permitted to "fly speck" the statements, Brooks v. Coleman, supra, 518 F. 2d at 19, or to use the applicable statutes as

"a crutch for chronic faultfinding", Life of the Land v. Brinegar, supra, 485 F. 2d at 472. Its duty, instead, is to see that the officials and agencies involved have properly considered the relevant factors and that the administrative decision was not arbitrary, capricious or a clear abuse of discretion. The arguments of appellants' diligent counsel have not demonstrated that the district court erred in its findings and conclusions on these issues.

The judgment appealed from is affirmed.

FOOTNOTES

1. The complete traffic plan also contemplates expressways running to the north and to the south from the outer loop, but they are not involved in this proceeding.

2. Compass directions have been simplified for purposes of this opinion.

3. Section 4(f), so far as pertinent, forbids the Secretary of Transportation from approving any project requiring the use of publicly owned park land unless there is no feasible and prudent alternative to such use and the program includes all possible planning to minimize harm to the park. Similar provisions are contained in section 138 of the Federal-Aid Highway Act, 23 U.S.C § 138.

4. The district court's order was made conditional upon the United States Coast Guard's grant of permission for bridge construction as required by 33 U.S.C. § 401. Applications for construction permits had been filed fourteen months before the district court hearing, and permission was granted shortly thereafter.

5. The EIS points out that in a study done by the Rochester Committee

for Scientific Information, the conclusion was reached that a southern route around the park would be so long and circuitous that it would not be utilized by motorists.

6. The appendix to the EIS contains an 80-page Tunnel Cost Study prepared under the guidance of James Washington, tunnel specialist for the Federal Highway Administration. The cost estimates contained therein are predicated upon a 1973 construction contract date. They also assume the absolute optimum of subsurface conditions. The report points out that, if unfavorable conditions are encountered, tunneling costs could increase "threefold".

7. Appellants urge that the district court failed to undertake the "searching and careful" inquiry into the facts demanded by Citizens to Preserve

Overton Park v. Volpe, 401 U.S. 402, 416 (1971). The district judge adopted the government's proposed findings of fact and conclusions of law in their entirety, omitting the formality of retyping, on the day following oral argument, during the course of which he indicated that he had not yet read the voluminous documents upon which his decision hinged. Nothing we have said about the limited scope of review applicable to environmental impact statements should be read to detract from Overton Park's admonition, nor to imply approval of what appears to be a cursory treatment of the issues in this case. However, this Court, which is in "as good a position as the district court to determine on the undisputed facts what could reasonably be demanded of the EIS in issue", County of Suffolk v. Secretary of the Interior, supra at 5532, has made a

thorough, in-depth review of the record and finds nothing to indicate that the district court erred in its determination.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

MONROE COUNTY CONSERVATION COUNCIL, INC., and RAY HUTHER ON HIS BEHALF AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

-vs-

Civil No. 1971-338

JOHN A. VOLPE, INDIVIDUALLY AND AS SECRETARY OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION,

Defendant.

ORDER

This matter came before the Honorable Harold P. Burke, United States District Judge, on July 28, 1977, for an order vacating and dissolving the injunctive order of reversal and remand made by the United States Circuit Court of Appeals for the Second Circuit on December 18, 1972 or in the alternative, should the United States Coast Guard not have granted approval of the permits

required for the construction of bridges over the Genesee River and the Erie Barge Canal, for a conditional order vacating and dissolving the injunctive order of reversal and remand made by the United States Circuit Court of Appeals for the Second Circuit on December 18, 1972 upon the condition that the Federal Highway Administration shall not fund the construction of the Outer Loop nor authorize advance acquisition of right-of-way unless and until such permits have been granted.

Now upon consideration of the Petition of Robert E. Kirby, Regional Federal Highway Administrator; the Affidavit of Victor E. Taylor, Division Administrator, Federal Highway Administration; the Affidavit of William A. Nostrand, Jr., Director of the Office of Environment and Design, Federal Highway Administration; and the Affidavit of William C.

Hennessy, Commissioner of Transportation of the State of New York; and after hearing counsel for the plaintiffs and for the defendants, it is hereby

ORDERED that the defendant's motion is hereby granted; and it is further

ORDERED that all injunctive restrants contained in the order of reversal and remand made by the United States Court of Appeals for the Second Circuit on December 18, 1972, and any further and subsequent orders of this court made in this case are hereby vacated and dissolved upon condition that the Secretary of Transportation and/or the Federal Highway Administration shall not fund the construction of the Outer Loop nor authorize advance acquisition of right-of-way for the Outer Loop unless and until all necessary bridge permits have been issued by

the United States Coast Guard.

Dated at Rochester, New York

July 29, 1977

HAROLD P. BURKE
United States
District Judge

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 48-September Term, 1972.

(Argued October 12, 1972
Decided December 18, 1972.)

Docket No. 72-1363
(472 F. 2d 693)

MONROE COUNTY CONSERVATION COUNCIL, INC., AND RAY HUTHER, ON HIS OWN BEHALF AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellants,

-vs-

JOHN A. VOLPE, INDIVIDUALLY AND AS SECRETARY OF THE UNITED STATED DEPARTMENT OF TRANSPORTATION,

Defendant-Appellee.

BEFORE:

Friendly, Chief Judge,
Medina and Anderson, Circuit Judges.

Appeal from summary judgment in an action seeking to enjoin the Secretary of Transportation from granting approval and funding of an expressway through a public park, in the United States

District Court for the Western District of New York, Harold P. Burke, Judge.

Reversed and remanded.

THOMAS R. BURNS, ESQ., (Wayne M. Harris, Esq., Rochester, New York, on the brief) for Appellants.

JOHN D. HELM, ESQ., Department of Justice, Washington, D.C. (Kent Frizzell, Assistant Attorney General, C. Donald O'Connor, U.S. Attorney, Buffalo, New York, John T. Sullivan, Jr., Assistant U.S. Attorney, Buffalo, New York, and Jacques B. Gelin, Esq., Department of Justice, Washington, D.C., on the brief) for Appellee.

ANDERSON, Circuit Judge:

The Monroe County Conservation Council and other persons similarly situated seek to enjoin John Volpe, the Secretary of the United States Department of Transportation, from giving federal approval to and funding for a section of the Rochester, New York, "Outer Loop", also known as New York Route 47. The contemplated "Outer Loop" would, on

completion, be approximately twenty-three miles long, running from a point near the south shore of Lake Ontario, southerly around Rochester and thence northerly to the Lake shore. Sixteen miles of the loop have been completed, leaving two segments yet to be constructed. The particular project which is the focus of this action is a six lane divided espressway 4.25 miles long, designed to connect the existing loop from the Scottsville Road interchange, completed in 1965, on the west, with the Winton Road, finished in 1968, on the east. The State of New York seeks to construct the highway under the Federal Aid Highway Program, 23 U.S.C. §101,et.seq., with 60% federal financial reimbursement.

The appellants' principal objection to the highway project is that it will take eleven acres of parkland by cutting through the Genesee Valley Park, owned

by the City of Rochester, for some 3200 feet, to follow the Erie Barge Canal corridor through the park and across both the Genesee River and Red Creek. Approximately two-thirds of the sector through the park would be built on a viaduct.

The park, contained 800 acres of land, is fully served by bus from the inner-city and provides all the usual recreational facilities, including one of the nation's oldest public golf courses. In addition, an average of two hundred persons a day engage in boating on the Genesee River and Erie Canal in the park area.

If the highway is constructed, the appellants assert, among other things, that it will do substantial damage to trees and other natural flora and fauna, destroy walking paths adjacent to the Erie Canal, interrupt easy access to the

park, produce noise and pollution, and create a general nuisance inhibiting the aesthetic pleasures of the area.

Although state and federal highway officials have been involved in various formal and informal contacts concerning this project from at least 1957, the State has not yet submitted a program for federal aid funding and the federal government is not yet committed to the project, see, 23 U.S.C. §106(a). The federal government has, however, reviewed and approved the transcript of the public hearing held by the State on January 24, 1966, approved on February 8, 1967, preliminary location plans, and sanctioned on May 7, 1971 the taking of Genesee Valley Park land. Furthermore, it is undisputed that it stands ready to give final approval to the project when completed plans, specifications, and estimates are submitted.

This action, claiming violation of several federal laws and regulations, was instituted on July 20, 1971, and cross-motions for summary judgment were filed. Affidavits were submitted by both parties and the court took testimony from Robert E. Kirby, the New York Division Engineer for the Federal Highway Administration, before entering judgment for the defendant-appellee, the Secretary of Transportation.

The issues concern the construction and application of four areas of federal statutory law and whether or not the mandates of the statutes were complied with. These are: the National Environmental Policy Act; the statutes regarding the taking of parkland; the statute calling for hearings on highways constructed with federal financial aid; and the requirement that a permit be obtained to construct a bridge over a navigable

river. We hold that the requirements of the statutes and regulations were not adequately complied with. We, therefore, reverse and remand.

I. The National Evironmental Policy Act

The first point raised by the appellants is that the Secretary cannot approve federal funding of the project until he has filed an environmental impact statement as required by the National Environmental Policy Act of 1969, 42 U.S.C. §4321, et seq.[1]

Although the district court found that a statement approved by Secretary Volpe on May 7, 1971, satisfied the requirements of a NEPA impact statement, the Secretary relies in this court almost exclusively on the argument that no impact statement is required.

Before dealing with this latter contention, however, it is necessary to consider whether or not the Secretary's two

and one-half page statement entitled "Environmental Statement and Determination," does satisfy NEPA and the obligations placed upon him by 49 U.S.C. § 1653(f) and 23 U.S.C. §138.[2] We are satisfied that it falls far short of the NEPA requirements, as well as the Council on Environmental Quality Guidelines, 36 Fed. Reg. 7729-7729 (1971), and the Department of Transportation Order 5610.1 (October 7, 1970), designed to implement NEPA.

The primary purpose of the impact statement is to compel federal agencies to give serious weight to environmental factors in making discretionary choices, see, Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F. 2d 783, 787 (D.C. Cir. 1971); National Helium Corp. v. Morton, 455 F. 2d 650, 656 (10 Cir. 1971); Calvert Cliffs' Coord. Comm., Inc. v. Atomic Energy Comm., 449 F. 2d 1109,

1114 (D.C. Cir. 1971). It is, at the very least, "an environmental full disclosure law," Environmental Defense Fund, Inc. v. Corps of Engineers, 325 F. Supp. 749, 759 (E.D. Ark. 1971), for agency decision makers and the general public. In light of this, the Secretary of Transportation was bound fully to comply with the requirements of the statute, and more token efforts in that direction do not suffice.

Other than saying that a road will go through a park, the Secretary's statement does not cover four of the five items required by the statute, 42 U.S.C. §4332(2)(C) even though he is required to discuss them in detail. These are: (i) the environmental impact, such as the amount of land that will be taken and the volume of traffic which well be using the highway; (ii) adverse environmental effects which cannot be avoided,

such as the noise and pollutants which will be generated; (iv) the relationship between local short-term use of the land and the maintenance and enhancement of long-term productivity; and (v) irreversible and irretrievable commitments of resources which would be involved if the highway were built, such as the number of trees that would be destoyed. The statement makes passing mention of possible alternatives to the proposed action (iii), but it does so in such a conclusory and uninformative manner that it affords no basis for a comparison of the problems involved with the proposed project and the difficulties involved in the alternatives. The requirement for a thorough study and a detailed description of alternatives, which was given further Congressional emphasis in §4332(2)(D), is the linchpin of the entire impact statement.[3] Without the

detailed statement the conclusions and decision of the agency appear to be detached from and unrelated to environmental concerns, see, Natural Resources Defense Council, Inc. v. Morton, 458 F. 2d 827, 833-37 (D.C. Cir. 1972); see also, Greene County Planning Bd. v. Federal Power Comm., 455 F. 2d 412, 419 (2 Cir.), cert. denied, 41 USLW 3184 (Oct. 10, 1972). Consideration of course, must also be given to the feasibility and impact of the abandonment of the project. Calver Cliffs', supra, at 1114; Seaborg, supra, at 787.

Another requirement of §4332(2)(C) is that comments on the proposed action must be sought from other federal agencies with expertise in the field. While the record reveals that the Transportation Department did receive letters from the Department of the Interior and the Department of Housing and Urban Development

concerning the taking of the parkland, there is no indication that they accompanied the statement through the review process as required by this section and in compliance with Department of Transportation Order 5610.1 (7)(e), (g). Obviously there is no purpose in obtaining outside views if they are not placed before the decision maker, especially those which may be opposed to the project, see, Greene, supra, at 418.

Finally, there is no indication that the Department of Transportation sought the opinion of the Council on Environmental Quality, as required by §4332 (2)(C) and the Council's Guidelines, 10 (b), 36 Fed. Reg., at 7726.

The Secretary's statement is plainly insufficient to satisfy the NEPA requirements. It is, therefore, necessary to consider the Secretary's claim on appeal that no statement is required for this

project.

An impact statement must be prepared for "major Federal actions significantly affecting the quality of the human environment," 42 U.S.C. §4332(2)(C). Although in some circumstances the terms "major" and significantly affecting ... the ... environment" have to be considered separately, Hanly v. Mitchell, 460 F. 2d 640, 644 (2 Cir.), cert. denied, 41 USLW 3254 (Nov. 6, 1972) the Department of Transportation has determined that any action significantly affecting the environment is major, DOT Order 5610.1, Definitional Guidelines (2), and that any approval of a project taking parkland is one significantly affecting the environment, id., at (4)(a)(2). Even apart from the Transportation Department's Order, however, there is no difficulty in concluding that this is the type of action which requires an impact statement.

As the cost of the viaduct section alone would be over $14,000,000, of which the federal government is asked to contribute 60%, there is no question that this is major action, cf., Upper Pecos Ass. v. Stans, 452 F. 2d 1233, 1235 (10 Cir. 1971), cert. granted, 406 U.S. 944 (1972); Named Ind. Conservation Society v. Texas Highway Dept., 446 F. 2d 1013, 1024-25 (5 Cir. 1971), cert. denied, 406 U.S. 933 (1972), and it cannot be disputed that a taking of eleven acres of parkland in a thickly settled city significantly affects the human environment.

The crux of the Secretary's argument, however, is that NEPA does not apply to a project which was as far advanced as this one on the effective date of the Act, January 1, 1970. But it is only this specific 4.25 mile segment of highway which is of concern. It is true that other portions of the contemplated

"Outer Loop" have been completed, but that fact does not in any way obligate the federal government to fund the section in question here.

Congress directed that NEPA, which provided for an impact statement, was to be implemented to "the fullest extent possible," 42 U.S.C. §4332. In using this language, it was not creating a loophole to avoid compliance, but rather was stating that NEPA must be followed unless some existing law applicable to the agency made compliance impossible, Conf. Rep. No. 91-765, 91st Cong., 1st Sess., U.S. Code Cong. & Ad. News 2767, 2770 (1969). See also, Ely, supra, at 1138, Calvert Cliffs', supra, at 1114-15. This court has been rigorous in applying NEPA to Federal Power Commission decisions, even where hearings were held prior to the effective date, Scenic Hudson Preservation Conf. v. Federal Power Comm., 453

F. 2d 463, 481 (2 Cir. 1971), cert. denied, 407 U.S. 926 (1972), and a project was under construction but not licensed prior to the effective date, Greene, supra, at 424.

With regard to highway aid, the federal government is not obligated to fund a particular project until the Secretary of Transportation has approved plans, specifications, and estimates for the construction, 23 U.S.C. §106(a) (PS&E Approval). This approval in the present case was not given prior to the effective date of NEPA, and, therefore, an impact statement must be prepared, San Antonio Conservation Society, supra, at 1025; Arlington Coalition on Transportation v. Volpe, 458 F. 2d 1323, 1330-32 (4 Cir. 1972). See also Lathan v. Volpe, 455 F. 2d 1111, 1120 (9 Cir. 1971).[4]

II. Taking of Parkland

The appellants also contend that the

Secretary acted in excess of his authority in approving the use of land from the Genesee Valley Park for this highway project. Two identical statutes say that "the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park ... unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park ... resulting from such use," 23 U.S.C. §138; 49 U.S.C. §1653(f).

Relying on the Secretary's statement of May 7, 1971 (which was also designed to fulfill the NEPA requirements), the court below found that the defendant acted within the scope of his authority and not arbitrarily or capriciously.[5]

These statutes, which are particularly intended to protect parkland, represent a determination by Congress

that "everything possible should be done to insure [parklands] being kept free of damage or destruction by reason of highway construction," S. Rep. No. 1340, 90th Cong., 2d Sess., U.S. Code Cong. & Ad. News, 3482, 3500 (1968); see also San Antonio Conservation Society, supra, at 1024. It is often an irresistible temptation to take parkland for highways, because it already belongs to the public and is usually more convenient for road construction, but these laws are "a plain and explicit bar to the use of federal funds for construction of highways through parks [with] only the most unusual situations ... exempted," Citizens to Preserve Overton Park v. Volpe, 401, 411 (1971).

The exception to the prohibition is when there is "no feasible or prudent alternative" to the taking. A feasible alternative route is one that is compatible with sound engineering, Overton

Park, supra, at 411; D.C. Federation of Civic Associations v. Volpe, 459 F. 2d 1231, 1237 (D.C. Cir. 1971), cert. denied, 405 U.S. 1030 (1972), and a prudent alternative route is one that does not present unique problems, that is, an alternative without truly unusual factors so that the cost or community disruption would reach extraordinary magnitudes, Overton Park, supra, at 412-13. In other words, a road must not take parkland, unless a prudent person, concerned with the quality of the human environment,[6] is convinced that there is no way to avoid doing so.

Therefore the district court must make "a thorough, probing, in-depth review" to be assured that the Secretary, in approving the taking of parkland, has acted properly. Overton Park, supra, at 415. It is abundantly clear that such a review was not undertaken in this case,

and under the circumstances, summary judgment was an unusually inappropriate vehicle for determination of the issues. The plaintiffs below in support of their motion filed the affidavit of an engineer outlining three possible alternatives to the taking of parkland, and the Secretary's witness, Highway Engineer Kirby, testified that the only routes given formal consideration were ones which went through the park.

Even if there is no feasible and prudent alternative to the taking of parkland, the Secretary still may not give his approval until there has been "all possible planning to minimize harm to such park." This requirement also has not been met in this case.

There is evidence in the record indicating that in the last several years New York officials have been making some efforts to limit the adverse

impact of the highway on the park; however, the Secretary has nowhere made the actual implementation of these suggestions a condition of his approval, ef., San Antonio Conservation Society, supra, at 1016-17. Rather, several times he has refused to impose conditions because he claims that he is confident that the state officials will do all they can to minimize the damage to the park; and, in his statement approving the use of the park, the Secretary refers to studies underway that will determine what type of highway structure will enhance rather than detract from the park. He concluded that "all possible planning to minimize harm has been and will continue to be exercised by the responsible officials." (Emphasis added.) The statutory mandate is not fulfilled by vague generalities or pious and self-serving resolutions or by assuming that

someone else will take care of it. The affirmative duty to minimize the damage to parkland is a condition precedent to approval for such a taking for highway purposes where federal funds are involved; and the Secretary must withhold his approval unless and until he is satisfied that there has been, in the words of the statute, "all possible planning to minimize harm to such park ...," and that full implementation of such planning to minimize is an obligated condition of the project, see, D.C. Federation, supra, 459 F. 2d at 1239.

III. Hearings

Citing both a statute, 23 U.S.C. §128, and Department of Transportation regulations pursuant to it, Policy and Procedure Memorandum (PPM) 20-8, 23 C.F.R. App. A (1972), the appellants claim that a second public hearing on this highway project must be held before

the Secretary can approve federal aid. An initial hearing was held by New York state highway officials on January 24, 1966.[7]

At the time of the public hearing, federal law required state highway departments to hold public hearings to consider the economic effects of proposed highway locations;[8] however, the statute was amended, effective August 23, 1968, to require the hearings to consider not only the economic effect of a location, but also the social and environmental effects of such a plan, and in 1970 the statute was further amended to require the state to file a report with the Secretary indicating the consideration given by it to the economic, social, environmental and other effects of a planned highway.[9]

The primary question, here, is whether or not the State Highway Department must, for this project, hold the

expanded hearings required by the 1970 amendment. The district court made no ruling on this point and the appellee Secretary did not argue it.

The Fourth Circuit, the only one to have previously considered this problem, has held that the expended hearings must be held if the project is not at a critical stage, i.e., one at which the costs of a new location would certainly outweigh the possible benefits of a change, Arlington Coalition, supra, at 1337; Fayetteville Area Chamber of Commerce v. Volpe, 463 F. 2d 402, 406 (4 Cir. 1972). We adopt a more definite standard, which is not necessarily in conflict with that of the Fourth Circuit, and that is that the expanded hearings are required whenever PS&E approval has not been given prior to the effective date of the amendment. This rule is based upon the fact that a hearing is

a condition precedent to the granting of federal aid, and, therefore, the Secretary must apply the statute which is in effect when he awards that aid. This concept is consistent with the federal policy which favors the advancement of environmental concerns, 42 U.S.C. §4332 (1), and gives recognition to the importance of the hearings to proper decision making, see, D.C. Federation of Civic Associations v. Volpe, 434 F. 2d 436, 441-42 (D.C. Cir. 1970).

In light of the fact that New York has not yet submitted plans for PS&E approval, it is required to hold the hearings and make the formal report mandated by the present §128. It is beyond question that the 1966 hearing was insufficient to comply with the current requirements. For one thing, the viaduct structure was not part of the plans presented at that hearing, and it was

therefore impossible for the hearing to focus on the environmental impact of such a major design feature.

In order to implement the 1968 amendment to 23 U.S.C. §128, the Department of Transportation issued its Policy & Procedure Memorandum (PPM) 20-8 on January 14, 1969, which, in all cases, provides for both a "corridor public hearing" and a "highway design public hearing." The corridor hearing is preliminary and is concerned with "the need for, and the location of, a Federal-aid highway." The "highway design public hearing" is a hearing that:

> "(1) Is held after the route location has been approved, but before the State highway department is committed to a specific design proposal;
>
> (2) Is held to ensure that an opportunity is afforded for effective participation by interested persons in the process of determining the specific location and major design features of a Federal-aid highway; and

> (3) Provides a public forum that affords a full opportunity for presenting views on major highway design features, including the social, economic, environmental, and other effects of alternate designs." PPM 20-8, (4)(b).

At this hearing the state presents the major design features of a proposed highway for public comment and discussion and the ideas, suggestions, criticisms and facts garnered from the hearing are considered by the state highway department along with its own data and studies in producing the design which it submits to the Secretary for approval.

We think it is clear that the requirements of the highway design hearing, as outlined in PPM 20-8, will be met by any hearing sufficient to satisfy the requirements of 23 U.S.C. §128(a), since the statute requires that the state consider "the economic, social, environmental, and other effects of the plan or highway location or design and various

alternatives which were raised during the hearing ...." Therefore, it is unnecessary for us to decide whether or not the PPM, by its own terms, see, e.g., PPM 20-8 §6(d), requires the design hearing for this project which was under way when the PPM was issued.

While it is true that the state has held one location hearing with respect to this project, no consideration of the environment was required by the statute at that time. Moreover, as we have noted, see fn. 7, it appears that discussion at the hearing was improperly restricted. Such a hearing will in any event be most valuable in aiding the agency in its preparation of the impact statement which we have today held is required by NEPA.

IV. Bridge Permit

It is unlawful to construct a bridge over any navigable river without a permit, 33 U.S.C. §401.[10] The Conservation

Council claims that the Secretary may not approve this project until such a permit has been obtained for the planned construction over the Genesee River, but the district court found that no permit was required because the river was not navigable. On appeal, the Secretary admits that the portion of the river in question is navigable as previously found by this court in Rochester Gas & Electric Corp. v. Federal Power Comm., 344 F. 2d 594 (2 Cir.), cert. denied, 382 U.S. 832 (1965), but he argues instead that his approval of the project is not dependent upon the acquisition of a permit by the State of New York.

This position is wholly untenable. When the Secretary gives his approval to a project, there is "a contractual obligation of the Federal Government for the payment of its proportional contribution thereto," 23 U.S.C. §106(a). It defies

reason to think that the federal government should obligate itself to a project which has not yet complied with federal law, and Department of Transportation regulations specifically state that no federal funds are to be paid for any cost incurred not in conformity with federal law, 23 C.F.R. 1.9 (1972). It is also interesting to note that Highway Division Engineer Kirby testified that it is normal operating procedure to make certain that a state has all necessary permits before it is allowed to begin construction. Therefore, no approval for federal funding of this project can be given until the State has secured the necessary permit to build a bridge over the Genesee River.

The decision of the district court is reversed, and the case is remanded with the direction that the Secretary of Transportation be enjoined from approving

the funding of the 4.25 mile segment of the Rochester "Outer Loop," until the court, after proper hearing is satisfied:

> (1) that the requirements of NEPA have been met, including the preparation and good faith consideration of an impact statement;
>
> (2) that there is no feasible and prudent alternative to the taking of parkland and that all possible planning has been done to minimize harm to the park;
>
> (3) that the State has held the hearing required by 23 U.S.C. § 128(a) and filed a copy of the transcript and the necessary report on its consideration of the hearing with the Secretary; and
>
> (4) that the State has acquired the permit necessary to build a bridge over the Genesee River.

All of these directions shall be construed and applied in conformity with the opinion of this court.

MEDINA, Circuit Jedge (concurring):

I concur, but with some reluctance. I am reluctant because I think one unfortunate result of our decision in this

case will be a further delay of four or five years that could easily have been avoided. And this delay will cause great hardship to the people of Rochester who have already waited too long for the completion of this Outer Loop around the city. What bothers me is that a study of this record makes it fairly certain that after all the i's have been dotted and all the t's crossed, the final construction will be substantially the same as the one now proposed and rejected by us.

On the other hand, I am persuaded that some state and federal highway officials are inclined to look down on conservationists and environmentalists as trouble makers. The only way to change this attitude it to require full and strict compliance with applicable valid statutes and administrative regulations. That there has been no such

compliance here is clearly established in my brother Anderson's well reasoned and persuasive opinion.

FOOTNOTES

1. The pertinent part of NEPA for this claim is 42 U.S.C. §4332(2)(C),(D):

> "The Congress authorizes and directs that, to the fullest extent possible:
> ... (2) all agencies of the Federal Government shall--
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--
> (i) the environmental impact of the proposed action.
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
> (iii) alternatives to the proposed

action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President,

the Council on Environmental quality and to the public as provided by Section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;".

2. For a discussion of these statutes, see the next section, infra.

3. The Council on Environmental Quality Guidelines, 6(iv), 36 Fed. Reg. 7724, 7725 (1971), states that:

"A rigorous exploration and objective evaluation of alternative actions that might avoid some or all of the adverse environmental effects is essential."

4. The only Courts of Appeals decisions holding that NEPA did not apply to federal highway aid were in cases in which "PS&E approval" had been given by the Secretary prior to January 1, 1970, Ragland v. Mueller, 460 F. 2d 1196 (5 Cir. 1972); Pennsylvania Environmental Council, Inc. v. Bartlett, 454 F. 2d 613, 624 (3 Cir. 1971).

It should also be noted that 23 U.S.C. §109(h) requires that not later than 90 days after July 1, 1972, the Secretary promulgate guidelines to be applied to all projects that had not yet received "PS&E approval" prior thereto, to insure that certain specified environmental factors are considered in Federal-aid highway approvals.

5. In addition to the Secretary's statement, the court had before it the affidavit and testimony of Highway Division Engineer Kirby. Included as part of the

affidavit was a bundle of papers entitled, "Volpe's Office File on Section 4(f) [49 U.S.C. §1653(f)]," which allegedly was the administrative record upon which he acted.

Although formal findings are not required by the statutes, DOT Order 5610.1 (8)(c) does require them as of October 7, 1970, ef., Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 417-18 (1971). Although not urged as a point on appeal, the Secretary's May 7, 1971 statement does not comply with the DOT order in a number of respects and, if the Department further considers the funding of this project, it should follow its own directive.

6. Congress has mandated that all federal laws shall be interpreted in accordance with the policies set forth in the National Environmental Policy Act of 1969, 42 U.S.C. §4332(1).

7. The Conservation Council also attacks the validity of this hearing on the ground that it was held at 2:00 p.m. on a business day during a heavy snowstorm, and was, therefore, inconvenient to the public. There is no merit to this claim.

The hearing itself was improperly conducted. The purpose of the hearings is to permit the people who will be affected by highway construction to voice their suggestions and complaints, ef., S. Rep. No. 1340, 90th Cong., 2d Sess., U.S. Code Cong. & Ad. News, 3483, 3492 (1968); yet the moderator began the hearing by stating that "the objective of the hearing is to provide an assured method whereby the State can furnish to the public information concerning the State's highway construction proposals. We are not here to engage in a free-for-all debate." The highway officials, in

addition to presenting and describing the project are there to hear what the unorganized public has to say about it.

8. 23 U.S.C. §128(a) (1966).

9. 23 U.S.C. §128 (1970).

10. The Secretary of Transportation, who is given the authority to issue permits by 49 U.S.C. §1655(g)(6)(A), has delegated this authority to the Commandant of the Coast Guard, 49 C.F.R. §1.46 (c)(8) (1972), who is the official by whom the decision must be made, see, Accardi v. Shaughnessy, 347 U.S. 260, 265-67 (1954).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

MONROE COUNTY CONSERVATION COUNCIL, INC., and RAY HUTHER, ON HIS OWN BEHALF AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

-vs- CIVIL 1971-338

JOHN A. VOLPE, INDIVIDUALLY AND AS SECRETARY OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION,

Defendant.

Wayne M. Harris, Esq.
226 Powers Building
Rochester, New York 14614
Attorney for plaintiffs

Michael R. Wolford, Esq.
Assistant United States Attorney
for the defendant

Plaintiffs by notice of motion filed July 27, 1971 moved for a preliminary injunction. The plaintiffs by notice of motion filed September 27, 1971 moved for summary judgment in plaintiffs' favor. The defendant by notice of motion filed September 21, 1971 moved for summary

judgment in his favor. All the motions came on for argument before this court on October 14, 1971. Both parties have filed written briefs.

FINDINGS OF FACT

1. This action brought by the plaintiffs is considered to be a proper class action.

2. The Rochester Outer Loop, also known as Route 47, is a highway being constructed by the New York State Department of Transportation and financed in part by the Federal Highway Administration.

3. A segment of the Outer Loop, about 4.25 miles long, is proposed from the existing interchanges at Scottsville Road on the west to Winton Road on the east, crossing the Genesee River and Red Creek near its confluence with the New York State Barge Canal and crossing the Barbe Canal about 1/2 mile east of East Henrietta Road.

4. This segment is proposed to cross Genesee Valley Park along the Barge Canal corridor for a distance of 3200 feet; 2200 feet of said highway is to be on a viaduct over the park area.

5. On May 7, 1971, the Secretary of Transportation, John A. Volpe, approved the construction of the segment through Genesee Valley Park pursuant to the authority vested in him by Title 49, U.S.C. Section 1653(f) and Title 23, U.S.C. Section 138.

6. In his decision, the Secretary determined: (1) There were no feasible or prudent alternatives to the construction of said highway; (2) The proposal included all possible planning to minimize harm to the park resulting from such use.

7. The decision of the Secretary was within the scope of his authority, was not arbitrary nor capricious and was

within his discretion and in accordance with law, and complied with the necessary procedural requirements.

8. No federal funds have been requested for said project, although the federal government has approved the steps taken to date on the proposal in anticipation of the request for federal funds from the State of New York.

9. The Secretary and the Department of Transportation and the Federal Highway Administration have complied with the National Environmental Policy Act of 1969, as contained in Title 42, U.S.C. Section 4332 and the regulations issued by the Federal Highway Administration and the Department of Transportation for implementation of said Act.

10. The determination by the Secretary, encompassed within his findings dated May 7, 1971, show the review of other alternatives to the proposed

location, including the area to either the north or south of the park and other routes that would cross the park at other areas. The prior construction to the east and west of the project had already fixed the proposed corridor. A route to the north would not be prudent due to the extensive housing and location of the University of Rochester, Strong Memorial and Rochester State Hospitals. The proximity of the airport precludes the proposal of a highway location that would by-pass the park to the south. The other alternatives that were reviewed by the Secretary and eliminated, went through the park and would require the removal of extensive housing and would have a much greater damaging effect on the park area than the proposed route. The Secretary has found upon reasonable grounds that there are no feasible alternatives and that the

alternatives considered involved unique problems.

11. The determination of the Secretary contained in the 4(f) statement of his decision of May 7, 1971 was made in accordance with law and the review required was given by the appropriate officials using proper standards.

12. The public hearing of January 24, 1966, was held in conformance with Title 23, U.S.C., Section 128 and the Policy and Procedural Memorandum 20-8. The "design approval" was made on February 7, 1967. Since "design approval" was given prior to the effective date of the revised Policy and Procedural Memorandum 20-8 and within three years from the date of the public hearing, no new hearing was required. The applicable regulations have been complied with by the state and federal agencies.

13. The requirements of the National Environmental Policy Act of 1969 were complied with by the federal agencies involved. The defendant complied to the fullest extent possible with the applicable guidelines for implementation of the National Environmental Policy Act of 1969.

14. The New York State Department of Transportation applied for a permit on August 28, 1970 for approval of construction of a bridge over the Barge Canal, but did not apply for a permit to construct a bridge over the Genesee River. The Genesee River at the point where the bridge is planned is not navigable. No permit to construct the bridge is required.

CONCLUSIONS OF LAW

1. Plaintiffs' motions for a preliminary injunction and for summary judgment in their favor are denied.

2. Defendant's motion for summary judgment in his favor is granted upon the ground that there is no genuine issue as to any material fact and that the defendant is entitled to judgment in his favor as a matter of law.

3. Submit judgment in accordance herewith on notice on a regular motion day.

HAROLD P. BURKE
United States District Judge

December 30, 1971.

TITLE I

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

42 U.S.C. § 4321 et seq.

Purpose

Sec. 2. The purposes of this Act are: To delcare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

TITLE I

DECLARATION OF
NATIONAL ENVIRONMENTAL POLICY

Sec. 101. (a) The Congress, recognizing the profound impact of man's activity on the interrelations of all

components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfull the social, economic, and other requirements of

present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may--

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undersirable and unintended

consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

Sec. 102. The Congress authorizes

and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with policies set forth in this Act, and (2) all agencies of the Federal Government shall--

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and

and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(H) assist the Council on Environmental Quality established by title II of this Act.

Sect. 103. All agencies of the

Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act.

Sec. 104. Nothing in section 102 or 103 shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting

contingent upon the recommendations or certification of any other Federal or State agency.

Sec. 105. The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies.

SECTION 138

FEDERAL-AID HIGHWAY ACT

23 U.S.C § 138

138. Preservation of parklands.-- It is hereby declared to be the national policy that in carrying out the provisions of this title, the Secretary shall use maximum effort to preserve Federal, State, and local government parklands and historic sites and the beauty and historic value of such lands and sites. The Secretary shall cooperate with the States in developing highway plans and programs which carry out such policy. After July 1, 1968, the Secretary shall not approve under section 105 of this title any program for a project which requires the use for such project of any land from a Federal, State, or local government park or historic site unless such program includes all possible planning, including consideration

of alternatives to the use of such land, to minimize any harm to such park or site resulting from such use.

SECTION 4 (f)

DEPARTMENT OF TRANSPORTATION ACT

49 U.S.C. § 1653 (f)

(f) It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968 (Aug. 23, 1968), the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park,

recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

23 C.F.R. § 771.18

HIGHWAYS

§771.18 Content of the environmental impact statement.

(i) The probable impact of the proposed action on the environment.

(2)(iii) Social Impacts. This section will include a discussion of the significant social impacts anticipated to be cuased by the proposed action. The following are examples of groups that may have special problems and require special consideration with respect to access to jobs, schools, churches, parks, hospitals, shopping, and community services:

(A) elderly

(B) school-age children

(C) those dependent upon public transporation

(D) handicapped

(E) illiterate

(F) nondrivers

(G) pedestrians

(H) bicyclists

(I) low income

(J) racial, ethnic, or religious groups

AS ORIGINALLY PROMULGATED
OTHER SOCIAL IMPACTS

The general social groups specially benefitted or harmed by the proposed action should be identified in the statement, including the following:

a. Particular effects of a proposal on the elderly, handicapped, non-drivers, transit dependent, or minorities should be described to the extent reasonably predictable.

b. How the proposal will facilitate or inhibit their access to jobs, educational facilities, religious institutions, health and welfare services, recreational facilities, social and cultural facilities, and public transit services.

No. 77-1104

In the Supreme Court of the United States

OCTOBER TERM, 1977

MONROE COUNTY CONSERVATION COUNCIL, INC.,
PETITIONERS

v.

BROCK ADAMS, SECRETARY OF TRANSPORTATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECRETARY OF TRANSPORTATION IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1104

MONROE COUNTY CONSERVATION COUNCIL, INC.,
PETITIONERS

v.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-31 is reported at 566 F. 2d 419. The opinion of the district court (Pet. App. B-1 to B-4) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 22, 1977. The petition for writ of certiorari was filed on February 6, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Environmental Impact Statement prepared in connection with construction of the final segment of a perimeter highway around Rochester, New York, satisfied the requirements of the National Environmental Policy Act.

2. Whether the proposed construction of the highway segment violated Section 4(f) of the Department of Transportation Act.

STATEMENT

This case concerns the proposed construction of the final four-mile segment of the "Outer Loop" highway encircling the city of Rochester, New York. The Outer Loop highway system was proposed after years of planning by state, county, and city officials in an attempt to solve the serious traffic problems of Rochester and its adjoining towns. The Outer Loop now encircles the city except for a four-mile gap in the southwest portion of the perimeter, where the Genesee Valley Park is located. In 1968, the Bureau of Public Roads (now the Federal Highway Administration) approved a proposal to complete the Outer Loop by constructing a 2100-foot elevated viaduct over a small portion of the park (Pet. App. A-3 to A-4).

In 1971, petitioners filed suit to enjoin construction of that segment of the Outer Loop. They contended that the federal approval for the construction had failed to comply with various federal statutes, including the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 42 U.S.C. 4321 *et seq.*; Section 4(f) of the Department of Transportation Act of 1966 (DOTA), 82 Stat. 824, as amended, 49 U.S.C. 1653(f); Section 18(a) of the Federal-Aid Highway Act of 1968, 23 U.S.C. 138; and Section 9 of the Rivers and Harbors Act of 1899, 30 Stat. 1151, 33 U.S.C. 401. The district court denied relief (Pet. App.

D), but the court of appeals, in 1972, reversed. The court of appeals directed the Secretary of Transportation not to approve funding for the remaining portion of the Outer Loop until the Secretary was satisfied that the requirements of NEPA had been met, that there was no feasible and prudent alternative to taking the parkland, and that all possible planning had been done to minimize harm to the park. *Monroe County Conservation Council, Inc.* v. *Volpe*, 472 F. 2d 693 (C.A. 2).[1]

In compliance with the court of appeals' mandate, the Secretary of Transportation solicited comments from interested public and private agencies and held public hearings on the proposal to complete the Outer Loop. Five years later, after the preparation of a 395-page Environmental Impact Statement and an 81-page statement pursuant to Section 4(f) of DOTA, the Secretary gave final approval to the proposal. The district court, finding that the Secretary had complied with the mandate of the court of appeals, granted the Secretary's motion to vacate the injunction (Pet. App. B-1 to B-4).[2]

Petitioners again sought review in the court of appeals, claiming that the Secretary had still failed to comply with NEPA and DOTA. Petitioners contended that the two statements were inadequate because they failed to explore certain alternatives to the recommended action and

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[1]The court of appeals also required that, as a prerequisite to the commitment of federal funds, the State hold a hearing and file a report as required by the Federal-Aid Highway Act, and that the State obtain a permit to build a bridge over the Genesee River as required by the Rivers and Harbors Act of 1899. Each of these requirements has been met (Pet. App. A-6, A-28).

[2]The court's order was made subject to receipt of the necessary Coast Guard permits (33 U.S.C. 401), which were granted shortly after the district court's decision (Pet. App. A-28).

because they did not adequately discuss the social impact of the proposed construction. The court of appeals unanimously affirmed the district court's order dissolving the injunction (Pet. App. A-1 to A-31).

The court noted that the Secretary of Transportation had considered thirteen alternatives to the recommended proposal before he authorized funding for the completion of the highway over the park. After analyzing the alternatives discussed in the statements, the court concluded that the NEPA and DOTA statements had adequately surveyed the alternatives and that there was ample basis for the Secretary's determination that there were no feasible and prudent alternatives to the proposal he approved (Pet. App. A-21 to A-22). In addition, the court observed that the proposal included plans to build recreational trailways, boat ramps, and pedestrian access routes around the construction, and that major steps would be taken to prevent air, water, and noise pollution. The court thus held that the Secretary had taken sufficient steps to minimize harm to the park (Pet. App. A-24 to A-25).

Finally, the court of appeals concluded that adequate consideration had been given to the social impact of the proposed construction. As the court noted, the environmental impact statement had found that the proposal would not isolate any neighborhood, displace any residential, commercial, or industrial uses, or adversely affect any minority group (Pet. App. A-24). According to the EIS, the impact on the park itself would also be minimal. When the city had first determined to build the highway, it had acquired 27 additional acres of land to replace the park land that the highway would occupy. Under the recommended proposal, only 10.7 acres would be required for the viaduct, and 5.3 acres

beneath the viaduct would be returned to park usage after the construction was completed. Vehicular and pedestrian traffic through the park would not be affected, nor would any of the park's recreational facilities. The section of the park surrounding the viaduct would be converted into an active recreational area (Pet. App. A-24 to A-25).

ARGUMENT

This case presents no issue warranting review by this Court. The court of appeals applied well-settled principles governing the standard for reviewing the adequacy of NEPA and DOTA statements. See, *e.g.*, *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402; *Coalition for Responsible Regional Development* v. *Coleman*, 555 F. 2d 398 (C.A. 4); *Brooks* v. *Coleman*, 518 F. 2d 17 (C.A. 9); *Finish Allatoona's Interstate Right, Inc.* v. *Brinegar*, 484 F. 2d 638 (C.A. 5). The court's decision is not in conflict with any decision of this Court or of any court of appeals.

1. Petitioners first contend (Pet. 21-27) that the Secretary did not give adequate consideration to the social impact of the proposed construction. This failure, they claim, violated the Department of Transportation regulation that requires an EIS to include "a discussion of the significant social impacts anticipated to be caused by the proposed action." 23 C.F.R. 771.18(i)(2)(iii). Petitioners suggest that the portion of the EIS devoted to social impacts should have been more thorough, and that the Secretary was wrong in concluding that the social impact of the construction was insignificant.

Contrary to this contention, a substantial portion of the Statement was devoted to the probable social impact of the construction, and the Secretary's conclusion that it would have no significant impact was based on consideration of a variety of factors. Neither NEPA nor the

Department of Transportation's regulations require the Secretary to follow any particular practices or procedures in preparing an EIS, such as conducting a formal sociological study. They require only that there be "[sufficient] information as appears to be reasonably necessary under the circumstances for evaluation of the project." *New York* v. *Kleppe*, 429 U.S. 1307, 1311 (Marshall, J., in chambers). The court of appeals properly limited its review to determining that the Environmental Impact Statement contained a sufficiently thorough discussion of social consequences to permit an intelligent and informed judgment about the effect of the project on surrounding neighborhoods and park users. The court properly declined petitioners' invitation to make "a de novo determination concerning the advisability of the proposed construction" (Pet. App. A-26).

2. Nor were the Secretary's statements deficient (see Pet. 27-38) for failing to include alternative routes that petitioners consider preferable. As the court of appeals concluded from its analysis of the 13 alternatives explored in the EIS, the Secretary properly determined that all the other choices were either not feasible or not prudent (Pet. App. A-9 to A-22). Applying the guidelines established by this Court in *Overton Park, supra*, 401 U.S. at 416, the court of appeals noted each of the "relevant factors" and "unique problems" presented by the other alternatives that the Secretary considered.[4] In sum, the statements

[4]Petitioners argue that the decision of the court of appeals conflicts with this Court's decision in *Overton Park* (Pet. 27-35), but in fact the court of appeals specifically applied the *Overton Park* standards throughout its analysis. Petitioners' real claim appears to be that the court misapplied the principles of *Overton Park* to the facts of this case, a claim which, even if valid, would not merit this Court's review.

constituted "a reasonably comprehensive selection of alternatives, made in good faith" (Pet. App. A-21).[5]

An agency is not obligated to explore in detail every variation of the alternatives before it; it is required only to set forth those alternatives necessary to the making of a reasoned choice. *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, Nos. 76-419 and 76-528, decided April 3, 1978, slip op. 28-29; *Kleppe* v. *Sierra Club*, 427 U.S. 390, 410 n. 21; *Manygoats* v. *Kleppe*, 558 F. 2d 556, 559-560 (C.A. 10); *Coalition for Responsible Regional Development* v. *Coleman, supra*, 555 F. 2d at 400; *Brooks* v. *Coleman, supra*, 518 F. 2d at 19; *Fayetteville Area Chamber of Commerce* v. *Volpe*, 515 F. 2d 1021 (C.A. 4), certiorari denied *sub nom. Interstate 95 Commission* v. *Coleman*, 423 U.S. 912. In this case, the EIS explored the various alternatives in sufficient detail to provide an ample basis for a reasoned choice.[6]

[5]Petitioners also contend that this case conflicts with the decision of another panel of the same circuit, in which the court held that the proper test for judicial review was whether the EIS was compiled in good faith and would permit a decisionmaker fully to consider and balance the environmental factors (Pet. 35-38). Yet the court below quoted and specifically followed that language from the earlier opinion. See Pet. App. A-7, quoting from *County of Suffolk* v. *Secretary of the Interior*, 562 F. 2d 1368, 1375 (C.A. 2), certiorari denied, No. 77-685, February 21, 1978. In any event, an intra-circuit conflict is to be resolved by the court of appeals, not this Court. cf. *Wisniewski* v. *United States*, 353 U.S. 901.

[6]Petitioners suggest that the Secretary improperly failed to consider an "obvious" route around the southern border of the park (Pet. 33-34). The EIS, however, specifically addressed the possibility of a southern route around the park and reported that a study done by a private concern had reached the conclusion that the southern route would be so long and circuitous that motorists would not use it (Pet. App. A-28 to A-29).

3. Finally, petitioners contend (Pet. 38-44) that the district court acted with unseemly haste and insufficient deliberation in deciding to dissolve the injunction. Whatever the merits of this claim, the careful consideration given the case by the court of appeals cured any inadequacy in the district court's review. The facts were undisputed and were established almost entirely through documents. Therefore, as the court of appeals recognized (Pet. App. A-29 to A-31), that court was in as good a position as the district court to determine what could reasonably have been expected from the EIS and the Section 4(f) Statement. See, *e.g.*, *United States* v. *General Motors Corp.*, 384 U.S. 127, 141, n. 16; *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395-396; *County of Suffolk* v. *Secretary of the Interior*, 562 F. 2d 1368, 1375 (C.A. 2), certiorari denied, No. 77-685, February 21, 1978.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1978.

DOJ-1978-04